

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

ALVA AND ALBERTA PILLIOD,

Case No. RG 17862702

Plaintiffs,

V.

MONSANTO COMPANY; WILBUR-ELLIS COMPANY, LLC; and WILBUR-ELLIS FEED, LLC,

[TENTATIVE] ORDER (1) DENYING MOTION OF DEFENDANT FOR JNOV AND (2) CONDITIONALLY GRANTING MOTIONS OF DEFENDANT FOR NEW TRIAL.

DATE 7/19/19
TIME 9:00 AM
DEPT 21

Defendants.

The motions of Monsanto JNOV and for new trial came on for hearing on Friday 7/19/19,

in Department 21 of this Court, the Honorable Winifred Y. Smith presiding. Good cause

appearing, IT IS HEREBY ORDERED: The motion of Monsanto for JNOV is DENIED. (CCP

629.) The motion of Monsanto for a new trial regarding Alva Pilliod is CONDITIONALLY

GRANTED unless Mr. Billiod consents to entry of judgment in the amount of \$

The motion of Monsanto for a new trial regarding Alberta Pilliod is CONDITIONALLY

1 GRANTED unless Mr. Pilliod consents to entry of judgment in the amount of \$_____.

2 (CCP 662.6(a)(2).)

3

4 MOTION FOR JNOV

5 The motion of Monsanto for JNOV under CCP 629 is DENIED.

6 STANDARD

7 The court may enter judgment notwithstanding the verdict and enter a directed verdict.

8 (CCP 629.) “A directed verdict may be granted only when, disregarding conflicting evidence,

9 giving the evidence of the party against whom the motion is directed all the value to which it is

10 legally entitled, and indulging every legitimate inference from such evidence in favor of that

11 party, the court nonetheless determines there is no evidence of sufficient substantiality to support

12 the claim or defense of the party opposing the motion, or a verdict in favor of that party.”

13 (Magic Kitchen LLC v. Good Things Int'l, Ltd. (2007) 153 Cal. App. 4th 1144, 1154 (2007.).

14 (CCP 629.)

15

16 CAUSATION

17 All claims required plaintiffs to prove that Roundup caused the Pilliods to get NHL.

18 The court finds the evidence can support a finding that Roundup caused the Pilliods to get

19 NHL. The evidence was disputed regarding general causation. For example, NHL can be

20 idiopathic. The evidence was disputed regarding specific causation. For example, in addition to

21 being potentially idiopathic, there was evidence that each Pilliod had one or more risk factors

22 that suggest other causes of the NHL.

1 Causation is, however, a fact issue. The court found that plaintiff's experts could present
2 evidence under *Sargon* and that it was the responsibility of the jury to consider and weigh that
3 evidence. The evidence supports a finding of causation. (*Johnson & Johnson Talcum Powder*
4 Cases (2019) 2019 WL 3001626 at *20-25.) .
5
6

7 **WARNINGS CLAIMS.**

8 The claim for failure to warn required plaintiffs to demonstrate that Roundup's alleged
9 risk of NHL was "known or knowable in light of the generally recognized and prevailing best
10 scientific and medical knowledge" at the time that Monsanto distributed the Roundup that
11 allegedly caused their injuries. The evidence supports the verdict on the warning claims.
12
13

14 **DESIGN DEFECT CLAIMS**

15 The claims for strict liability and negligent design required Plaintiffs to prove that there
16 was a defect in the design of Roundup and that the defect caused their harm. (*Trejo v. Johnson &*
17 *Johnson* (2017) 13 Cal. App. 5th 110, 142. The evidence supports the verdict on the design
18 defect claims.
19
20

21 **PUNITIVE DAMAGES**

22 The claim for punitive damages required plaintiffs to prove by clear and convincing
23 evidence that Monsanto committed malice, oppression, or fraud. (Civ. Code § 3294.)
24
25

26 The court finds the evidence can support a finding by clear and convincing evidence that
Monsanto committed malice, oppression, or fraud. The evidence did not show that Monsanto
consciously disregarded a known or probable danger as shown in the public scientific literature.
27

1 There was clear and convincing evidence that (1) Monsanto internally made little to no effort to
2 follow up on indications that glyphosate and/or Roundup might be carcinogenic, (2) Monsanto
3 externally made a substantial effort to influence scientists to state that glyphosate and/or
4 Roundup were not carcinogenic, (3) Monsanto externally made a substantial effort to influence
5 the EPA to find that glyphosate and/or Roundup were not carcinogenic. In a pretrial motion on a
6 case with similar evidence and claims Judge Karnow stated:
7

8

9 The internal correspondence noted by Johnson could support a jury finding that
10 Monsanto has long been aware of the risk that its glyphosate-based herbicides are
11 carcinogenic, and more dangerous than glyphosate in isolation, but has
12 continuously sought to influence the scientific literature to prevent its internal
13 concerns from reaching the public sphere and to bolster its defenses in products
14 liability actions.
15

16

17 (*Johnson v. Monsanto* (Cal. Superior Court, 2018) 2018 WL 2324413.) There was evidence in
18 this case that would permit a jury to make those findings based on clear and convincing evidence.
19 The malice, oppression, or fraud that supports punitive damages can be based on Monsanto's
20 efforts to avoid or prevent reasonable and objective inquiry into matters that might reveal a
21 danger.

22 The court finds that due process requires the court to decrease the amount of damages.
23
24 The court addresses this in the motion for new trial.

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1 MRS. PILLIOD'S FUTURE ECONOMIC DAMAGES

2 "Where the fact of damages is certain, the amount of damages need not be calculated with
3 absolute certainty. ... The law requires only that some reasonable basis of computation of
4 damages be used, and the damages may be computed even if the result reached is an
5 approximation." (*Meister v. Mesinger* (2014) 230 Cal.App.4th 381, 396-397.)

6 Mrs. Pilliod's entire future economic damage case was based on her need for a lifetime
7 supply of Revlimid. Mrs. Pilliod presented evidence that would support the finding that her
8 future cost of medication is likely to be approximately \$15,000 per month, approximately
9 \$200,000 per year, and a total of \$2,957,710. This finding required the jury to make implicit
10 findings both about the cost of the medication and that she would be required to pay for
11 medication in the future. There is sufficient evidence to support both findings.

12
13
14 FIFRA PREEMPTION

15 The motion for JNOV based on FIFRA preemption is UNDECIDED. The court
16 addressed FIFRA preemption in the order of 3/18/19 at 17-19.

18 After the Order of 3/18/19, the United States Supreme Court on 5/20/19 issued *Merck v.*
19 *Albrecht* (2019) 139 S.Ct. 1668, which held that the question of whether FDA would have
20 approved of a change to a drug's label is a question of law for the court to decide, rather than a
21 question of fact for a jury to decide. PARTIES TO ADDRESS (1) whether Monsanto has
22 waived this by not bringing it up before entry of judgment, (2) whether this requires a reopening
23 of the preemption issue and an evidentiary hearing on the issue of impossibility.

1 MOTION FOR NEW TRIAL

2 The motions of Monsanto for a new trial as to Alva and Alberta Pilliod are
3 CONDITIONALLY GRANTED.

4

5 IRREGULARITIES IN THE PROCEEDING

6 Misconduct during Closing Statement and Misconduct throughout Trial. The motion on
7 this ground is DENIED. Counsel for plaintiff did on occasion overstate matters and violate the
8 court's orders. The court issued curative instructions to the jury. The facts are similar to those
9 in *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.4th 276, 295-298, where the court observed that
10 there were several incidents of misconduct during trial, but that there were also corrective
11 instructions, and that the misconduct did not cause prejudice. The court finds no prejudice to
12 Monsanto on the facts of this case.

13 This case is one of many in a coordinated proceeding. Therefore, the court also directs
14 counsel to the following statement: "Although we conclude Chao and Oasis have not shown
15 prejudice here, Stern's conduct was improper. Such conduct not only falls below professional
16 standards, it unnecessarily places the client at risk. ‘[P]unishment of counsel to the detriment of
17 his client is not the function of the court. [Citation.] Intemperate and unprofessional conduct by
18 counsel ... runs a grave and unjustifiable risk of sacrificing an otherwise sound case for recovery,
19 and as such is a disservice to a litigant.’ ” ... We expect more from our attorneys; in another
20 context reversal may well have been warranted." (*Bigler-Engler v. Breg, Inc.* (2017) 7
21 Cal.App.4th 276, 298.)

22 Joining Plaintiffs' Separate Claims in a Single Trial. The motion on this ground is
23 DENIED. The court addressed the concerns in the order of 1/25/19. The proceedings during

1 trial do not persuade the court that it erred in permitting the claims of the Pilliods to be tried in a
2 single case. As noted in the prior order, the evidence that both spouses both used Roundup and
3 both developed NHL would almost certainly have been presented to each jury had the claims
4 been tried separately.

5 Local pretrial publicity. The motion on this ground is DENIED.
6

7 Admission of expert evidence. The motion on this ground is DENIED. The court
8 addressed the concerns in the *Sargon* order of 3/18/19.

9 Admission or exclusion of evidence.

10 Proposition 65. The motion on this ground is DENIED. The court admitted EPA
11 information because it was directly relevant. The court initially excluded Proposition 65
12 information because it concerned a different scientific standard. The court later reasoned that if
13 information regarding non-EPA entities were to be admitted, that it be admitted evenhandedly.
14 For that reason, the court put the parties to an election (1) whether the jury should hear a broad
15 range of information including California's Proposition 65 and also information from various
16 countries or (2) whether the jury should hear a narrow range of information limited to EPA
17 information. The court admitted the broader range of information.

19 Industrial Bio-Test (IBT). The motion on this ground is DENIED. The court admitted
20 information about the scientific fraud at IBT because it was relevant to Monsanto's initial efforts
21 to obtain information about the safety of glyphosate. Monsanto had the opportunity to present
22 evidence about its subsequent studies.

23 EPA's 2019 Proposed Interim Registration Decision. The motion on this ground is
24 DENIED. In the middle of trial, on 4/30/19, the EPA released a document stating that the EPA
25 had considered comments and had not changed its position on the safety of glyphosate. The
26

1 document stated that the EPA had not changed its position. The document was cumulative
2 information. (Evid Code 352.) In addition, the EPA released the document mid-trial. The
3 science regarding glyphosate is still developing. Therefore, the court must balance the
4 procedural goal of trial (which is to reach a conclusion) and the substantive goal of trial (which to
5 ascertain the truth). The court reasoned that admitting the new EPA document would add
6 cumulative information and unduly consume additional time. (Evid Code 352.)
7

8 Trace Contaminants and Impurities. The motion on this ground is DENIED. The
9 occasional information about trace contaminants and impurities was not material. Monsanto had
10 the opportunity to explain that they were not at issue in this case.

11 POEA (surfactant). The motion on this ground is DENIED. The information about
12 POEA was material because it was an ingredient in Roundup. Monsanto had the opportunity to
13 explain its choice to use POEA and how POEA did or did not affect exposure to and absorption
14 of glyphosate.
15

16 “List Price” of Revlimid. The motion on this ground is DENIED. The information about
17 the list price of Revlimid was admissible. The issue in the case is not what Ms. Pilliod paid in
18 the past, but what she might have to pay in the future. The list price was relevant evidence given
19 the uncertainty of her future situation regarding reimbursement, subsidies, and insurance.
20

21 INSTRUCTIONAL ERRORS

22 Consumer Expectation Instruction. The court finds no error in giving this instruction.
23

24 Punitive Damages Instruction. The court finds no error in giving this instruction. The
25 court gave CACI 3940. There were two plaintiffs, so the jury had the opportunity to consider
26 punitive damages separately for each.

1

2 THE WEIGHT OF THE EVIDENCE

3 The court finds that there was substantial evidence to support the jury's findings that (1)
4 Roundup was a substantial factor in causing Alva Pilliod's DLBCL, (2) Roundup was a
5 substantial factor in causing Alberta Pilliod's PCNSL, and (3) Roundup was defectively
6 designed. The evidence was disputed, but there is substantial evidence to support the jury's
7 findings.

9 The court finds that there was substantial evidence to support the jury's findings on the
10 failure to warn claims. There is evidence that Monsanto was in possession of evidence that
11 glyphosate might be hazardous well before the Pilliods were diagnosed and well before they
12 stopped using Roundup. The phrase "known or knowable in light of the generally recognized
13 and prevailing best scientific and medical knowledge" is central to the issue.

14 The legal standard is designed to address the situation where there are a variety of
15 scientific opinions. A plaintiff cannot rely on a minority or outlier theory to support a failure to
16 warn claim. A defendant is permitted to rely on "the generally recognized and prevailing best
17 scientific and medical knowledge" in making its decisions about warnings.

19 In this case, there was evidence that Monsanto "continuously sought to influence the
20 scientific literature to prevent its internal concerns from reaching the public." (Judge Karnow.)
21 If the jury finds that a defendant has intentionally and successfully sought to influence "the
22 generally recognized and prevailing best scientific and medical knowledge" to minimize
23 scientific discovery or recognition of a risk, then the jury can reasonably infer that the scientific
24 information would probably have been adverse to the defendant. (CACI 203, 204.) From that
25 inference, the jury can reasonably infer that the "generally recognized and prevailing best

1 scientific and medical knowledge" would have supported a duty to warn if the defendant had not
2 interfered with the development of scientific and medical knowledge.

3 The court has considered *Johnson & Johnson Talcum Powder Cases* (2019) 2019 WL
4 3001626 at *26. The court states:

5 Viewed in the light most favorable to Echeverria, the evidence established JJCI
6 was aware of studies showing an association between talc and ovarian cancer,
7 studies showing talc could migrate from the vagina to the ovaries, and the theory
8 and corresponding research suggesting talc caused inflammation, eventually
9 leading to ovarian cancer. The evidence further established that, at least between
10 the 1990's and 2006, JJCI's response to these studies was to mount a defense
11 against them. In attempts to influence or persuade agencies such as the NTP and
12 IARC, and in response to media or governmental inquiry, JJCI's strategy was to
13 describe the flaws of these studies, point out inconclusive results, and highlight
14 the absence of any established causal link. The jury could reasonably infer that,
15 faced with the possibility that talc might be shown to cause ovarian cancer, JJCI's
16 response was focused solely on avoiding such a conclusion.

17 Where *J&J* differs from Monsanto is the next paragraphs, which state:
18

19 However, it was also undisputed that there has not been direct, conclusive
20 evidence establishing genital talc use causes ovarian cancer. ... The evidence
21 demonstrated it is not universally accepted in the scientific or medical community
22 that talc is even a significant risk factor for ovarian cancer. ...
23
24

1 There was no evidence JJCI had any information about the dangers or risks of
2 perineal talc use that was unavailable to the scientific or medical community. The
3 company's critiques of available evidence were largely consistent with third party
4 entities' evaluations of the same studies, including nontrade groups such as the
5 IARC and the FDA.

6

7 Regarding causation, there is evidence to support findings that glyphosate can cause NHL.
8

9 Regarding knowledge, there is evidence that Monsanto had internal information that was not
10 available to the scientific or medical community. As a result, the questions of what Monsanto
11 knew and when did it know it for purposes of the duty to warn are not limited to what is
12 available publicly.

13 The court finds that there was substantial evidence to support verdict on the duty to warn
14 claim.

15

16 CONSTITUTIONALITY OF THE DAMAGE AWARDS

17 ECONOMIC LOSS - MRS. PILLIOD'S ECONOMIC DAMAGE

18 “Where the *fact* of damages is certain, the amount of damages need not be calculated with
19 absolute certainty.” (*Meister v. Mesinger* (2014) 230 Cal.App.4th 381, 396-397.) There is
20 sufficient evidence to support findings that cost of the medication would be approximately
21 \$200,000 per year and that she will be required to pay for medication in the future.
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1 NONECONOMIC LOSS – PAIN AND SUFFERING.

2 “One of the most difficult tasks imposed upon a jury in deciding a case involving
3 personal injuries is to determine the amount of money the plaintiff is to be awarded as
4 compensation for pain and suffering. No method is available to the jury by which it can
5 objectively evaluate such damages, and no witness may express his subjective opinion on the
6 matter. ... In a very real sense, the jury is asked to evaluate in terms of money a deterrent for
7 which monetary compensation cannot be ascertained with any demonstrable accuracy.
8
9 Moreover, [n]oneconomic damages do not consist of only emotional distress and pain and
10 suffering. They also consist of such items as invasion of a person's bodily integrity (i.e., the fact
11 of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future
12 harm or injury, and a shortened life expectancy.” (*Bigler-Engler v. Breg, Inc.* (2017) 7
13 Cal.App.4th 276, 295-300.)

14 Mr. Pilliod is 77 years old and Mrs. Pilliod is a few years younger. The Pilliods
15 emphasize that they lead the active lives before their diagnoses. The measure of damages is not,
16 however, to compare a plaintiff's current combination of age, unrelated ailments, and injury with
17 the plaintiff's younger former self without the injury. The measure of damages is to compare a
18 plaintiff's current combination of age, unrelated ailments, and injury with the plaintiff's
19 hypothetical current combination of age and unrelated ailments without the injury.
20

21 In the preference statute, there is a legislatively acknowledged increased risk of death or
22 incapacity due to being over the age of 70. (*Kline v. Superior Court* (1991) 227 Cal.App.3d 512,
23 515.) The legislatively acknowledged risks that come with age that support a different, and
24 lower, standard for trial preference logically must also be a factor in evaluating whether the
25
26

1 effects of aging or the injury caused by defendant were the proximate cause of the any disability,
2 impaired enjoyment of life, or susceptibility to future harm or injury.

3 The court has considered *Izell v. Union Carbide* (2014) 231 Cal.App.4th 962. In that case
4 the plaintiff was an 86 year old man with a 2-3 year life expectancy. The jury awarded \$10
5 million in future noneconomic damages. The trial judge decreased the future damages to \$2
6 million. The Court of Appeal affirmed applying the abuse of discretion standard, stating
7 “Though we recognize the remitted amount remains on the high end of noneconomic damages
8 awards discussed in reported mesothelioma decisions—particularly for plaintiffs of the Izells'
9 advanced age—this alone is not sufficient to second-guess the trial judge, who presided over the
10 four-week trial and personally observed “the injury and the impairment that has resulted.”” (231
11 Cal.App.4th at 981.) *Izell* is authority for the proposition that \$1 million per year was not an
12 abuse of discretion on the facts of that case, but it is not authority that \$1 million per year is
13 appropriate or required in this case.
14

15 The jury awarded Mr. Pilliod \$8 million for past noneconomic loss and \$10 million for
16 future noneconomic loss. The record reflects that Mr. Pilliod went through a one-year period of
17 intense medical care related to his NHL, but that his situation has stabilized. Although Mr.
18 Pilliod’s health is impaired, his situation is due not only to the NHL but also to his history of skin
19 cancer and his other ailments. The court finds that the past noneconomic loss is not supportable
20 by the evidence. The court finds that \$[_____] is reasonable, based on [\$300k-\$1m per year] for
21 the period of intense medical care and [\$100-300k per year] for each of the other years since the
22 diagnosis.
23

24 The jury awarded Mrs. Pilliod \$8 million for past noneconomic loss and \$26 million for
25 future noneconomic loss. The evidence reflects that Mrs. Pilliod went through a longer period of
26

1 intense medical care and that her health has been more impaired by the NHL. Mrs. Pilliod has
2 been relatively healthy other than the NHL. The court finds that the noneconomic loss is not
3 supportable by the evidence. The court finds that \$[_____] is reasonable, based on [\$600k-\$2m
4 per year] for the period of intense medical care and [\$200-600k] for each of the other years since
5 the diagnosis.

6

7 PUNITIVE DAMAGES

8

9 Punitive damages are limited by constitutional considerations. The court must consider
10 three “guideposts” to determine whether a punitive award comports with due process: (1) the
11 degree of reprehensibility of the defendant’s actions; (2) the ratio between the compensatory
12 award and the punitive award; and (3) a comparison between the punitive damages awarded and
13 the civil penalties authorized or imposed in comparable cases. (*Roby v. McKesson Corp.* (2009)
14 47 Cal. 4th 686, 712 (2009).
15

16 The degree of reprehensibility is sufficient to support a substantial award of punitive
17 damages. The evidence supported a finding that Monsanto “continuously sought to influence
18 the scientific literature to prevent its internal concerns from reaching the public.” A defendant
19 can present the science that supports its products and mount a defense in public. That is a public
20 scientific debate based on facts. (*Johnson & Johnson Talcum Powder Cases* (2019) 2019 WL
21 3001626 at *26.) A jury can, however, find that a defendant has acted reprehensibly if it has
22 improperly influenced the scientific literature, ghostwritten articles, or withheld safety
23 information that it had an obligation to disclose.
24

25 The ratio between the compensatory award and the punitive award will depend on the
26 award of compensatory damages.

1 For Mr. Pilliod, the court is INCLINED to find that appropriate punitive damages are an
2 amount [2-4] times the combined economic and non-economic compensatory damages.

3 For Mrs. Pilliod, the court is INCLINED to find that appropriate punitive damages are an
4 amount [2-4] times the combined economic and non-economic compensatory damages,
5 excluding the \$2,957,710 attributable to the future cost of Revlimid. The court excludes the cost
6 of the Revlimid from the punitive damage calculation because although there is evidence to
7 support the cost of the drug as compensatory damages, the evidence is well short of clear and
8 convincing and therefore the court determines that it is not a proper on the facts of this case to
9 include it in the baseline for the punitive damages ratio test.
10

11

12 ORDER

13 The motion of Monsanto for JNOV is DENIED.

14 The motion of Monsanto for a new trial regarding Alva Pilliod is CONDITIONALLY
15 GRANTED unless Mr. Pilliod consents to entry of judgment in the amount of \$_____.
16
17 (CCP 662.6(a)(2).)

18 The motion of Monsanto for a new trial regarding Alberta Pilliod is CONDITIONALLY
19 GRANTED unless Mr. Pilliod consents to entry of judgment in the amount of \$_____.
20
21 (CCP 662.6(a)(2).)

22

23

24 Date

Winifred Y. Smith
Coordination Trial Judge